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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JIMMY WHITE,

Defendant and Appellant.

D038159

(Super. Ct. No. SCD153398)

APPEAL from a judgment of the Superior Court of San Diego County, Laura Palmer Hammes, Judge. Affirmed.

A jury convicted Jimmy White of robbery (Pen. Code, § 211).¹ In a separate proceeding, White admitted he had served four prior prison terms within the meaning of section 667.5, subdivision (b), had suffered two prior serious felony convictions within the meaning of section 667, subdivision (a)(1), and had two prior serious/violent felony

¹ All further statutory references are to the Penal Code unless otherwise specified.

convictions or strikes within the meaning of section 667, subdivisions (b) through (i).

The trial court sentenced White to 25 years to life under the "Three Strikes" law plus 10 years for the two prior serious felony convictions.

White appeals, contending (1) the trial court abused its discretion in not granting his motion for a new trial based upon his counsel's failure to retain an identification expert, (2) counsel's failure to request an alibi instruction (CALJIC No. 4.50) constituted ineffective assistance of counsel, and (3) it was error to give CALJIC No. 17.41.1.

FACTS

At about 1 p.m. on June 10, 2001, Nora Sagastume was working at Maya's 99 Cents Store on Adams Avenue. An African-American man approached Sagastume, who was at the cash register, and asked if she was alone. The man held one hand under his opposite arm, and Sagastume believed he had a weapon. The man asked Sagastume to open the register; she complied and stepped away. The man took approximately \$80 in cash and some papers, including store receipts for prepaid telephone cards and a photograph of Sagastume's ex-husband, from the register.

The robber told Sagastume to lie down. After the robber left the store, Sagastume yelled to her boyfriend, Julio Mederos, who was watching television in a back storage room. Sagastume pointed to a man running down the street and told Mederos he was the robber. Mederos ran after the man, who was wearing a black hooded sweatshirt and blue jeans. Meanwhile, Sagastume telephoned 911.

Mederos lost sight of the man after he went down an alley. A few minutes later, Mederos saw an African-American male with a build and hairstyle similar to that of the

man he had been chasing emerge from an apartment building.² This man, however, was wearing a white T-shirt and green pants. Believing this man to be suspicious, Mederos began following him.

When police arrived, Mederos directed them to the man, who turned out to be White. Police patted down White, handcuffed him and placed him in the back seat of a patrol car. About 20 minutes later, police drove Sagastume to the scene to see if she could identify White. Although Sagastume initially identified White as the robber, she subsequently told police she was not sure and did not believe that White was the robber because he was wearing different clothes. Police then released White.

The officer who had detained White in his patrol car searched the vehicle at the end of his shift and found \$69 in bills and various items from Maya's 99 Cents Store in the seat cushion of the back seat. Among other things there were receipts from the store and the photograph of Sagastume's ex-husband. These items were not in the car at the beginning of the officer's shift. No one other than White had been in the back seat of the car between the time the robbery occurred and the end of the officer's shift.

The next day, police arrested White at his residence.

White's wife, Gwendolyn White, testified on his behalf. Mrs. White said sometime after 10:30 a.m. or 11:30 a.m. on the date of the robbery, she and her husband

² Unknown to Mederos at the time, a 10-year-old boy had observed an African-American man changing his clothes in the breezeway of the boy's apartment complex. The man had taken off a pair of blue jeans and placed them in a trash can. The man was wearing green pants underneath the blue jeans. Later, police found a black hooded sweatshirt on some bushes over a fence near the trash can.

searched their neighborhood, which was near Maya's 99 Cents Store, for their dog, which had gotten loose. She was not with her husband the entire time, and at some point, left him and returned to their apartment alone. Mrs. White also said the black sweatshirt and blue jeans that had been discarded did not belong to her husband.

DISCUSSION

I. *New Trial Motion*

After the verdict, White retained new counsel who filed a motion for new trial. The motion was based on, among other things, ineffective assistance of counsel in not calling an eyewitness identification expert as a witness at trial. White contends the trial court abused its discretion in denying his motion for a new trial based upon counsel's failure to retain an identification expert. The contention is without merit.

In denying the motion, the trial court found that an eyewitness identification expert was not needed because the case was based on circumstantial evidence, not positive eyewitness identification evidence. Noting that the prosecution presented "an extremely strong case," the court also found White suffered no prejudice.

A defendant is entitled to a new trial if he or she received ineffective assistance of counsel at trial. (*People v. Lagunas* (1994) 8 Cal.4th 1030, 1036.) The determination of a motion for new trial rests so completely within the trial court's discretion that its ruling will not be disturbed on appeal absent a manifest and unmistakable abuse of discretion. (*People v. Delgado* (1993) 5 Cal.4th 312, 328; see also *People v. Davis* (1995) 10 Cal.4th 463, 524 ["A trial court has broad discretion in ruling on a motion for a new trial, and there is a strong presumption that it properly exercised that discretion."].)

To establish ineffective assistance of counsel, White must prove not only that he received representation below an objective standard of reasonableness, but that there is a reasonable probability he would have received a more favorable result but for the deficient representation. (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541.)

Where the ineffective assistance of counsel claim is presented by a motion for new trial (*People v. Chavez* (1996) 44 Cal.App.4th 1144, 1148), reviewing courts have recognized that the trial court is in the best position to determine both competence and prejudice when assessing the new trial motion; therefore, an appellate court gives great deference to the trial court's factual determinations and will not disturb the lower court's ruling absent an abuse of discretion. (*People v. Aubrey* (1999) 70 Cal.App.4th 1088, 1104, disapproved on other grounds in *People v. Rubalcava* (2000) 23 Cal.4th 322, 334, fn. 8.)

The trial court did not abuse its discretion when it denied the motion for new trial because White cannot establish either element of an ineffective assistance of counsel claim.

Generally, reviewing courts defer to trial counsel's tactical decisions in assessing a claim of ineffective assistance. (*People v. Ray* (1996) 13 Cal.4th 313, 349.) "Judicial scrutiny of counsel's performance must be highly deferential . . . a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*Strickland v. Washington* (1984) 466 U.S. 668, 689.) Thus, whenever counsel's conduct can be reasonably attributed to sound strategy, a reviewing court will presume that the conduct was the result of a competent tactical decision, and

defendant must overcome that presumption to establish ineffective assistance. (*Ibid.*; see also *People v. Ray*, *supra*, 13 Cal.4th at p. 349 [defendant bears burden of showing "the lack of a rational tactical purpose for the challenged act or omission"].)

Here, neither Sagastume nor Mederos was able to make a positive identification of White as the robber. As the trial court observed, the prosecution case was based on circumstantial evidence, not eyewitness identification. Hence, there was no need to call an expert to undercut the testimony of Sagastume and Mederos on this point. Further, the record does not show representation below an acceptable standard because it leaves open the possibility that counsel made a deliberate tactical decision to refrain from calling an expert. Counsel may well have thought that an eyewitness identification expert's testimony would add little to the defense case and possibly annoy the jury by extending the length of the case for ostensibly no good reason. Counsel is not obligated to present time-consuming witnesses when they add little or nothing to the defense case. We will not "second-guess" counsel's tactical decision. (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.)

Based upon the fact trial counsel contacted but did not retain an eyewitness identification expert, White suggests counsel did not hire the expert because the defense lacked the money to pay the expert and argues counsel was ineffective for not securing the money from the local agency empowered to authorize funding for experts. We disagree. There is nothing but speculation in this record to support the notion that the expert was not retained because the defense could not afford to pay the expert.

In sum, White has not demonstrated that counsel's failure to retain an eyewitness identification expert was objectively unreasonable. Nor has White shown he was prejudiced.

As the trial court noted, the prosecution presented "an extremely strong" circumstantial evidence case against White. Items taken during the robbery, including the photograph of Sagastume's ex-husband, were found in the back seat of the patrol car in which White had been detained. No one else had been in the back seat of the patrol car. Moreover, White matched the general description of the robber in these regards: race; build; and hairstyle. Mederos chased the robber to an alley, where he disappeared from sight. A man was observed near the alley taking off and throwing away his clothes. This man was wearing green pants underneath his discarded clothes. The discarded clothes matched the clothes worn by the robber. Shortly thereafter, Mederos saw White emerge from the alley wearing green pants.

Given this evidence, it was not reasonably probable White would have obtained a more favorable result if the counsel had called an eyewitness identification expert.

(People v. Bradford (1997) 14 Cal.4th 1005, 1052.)

The trial court did not abuse its discretion in denying White's motion for new trial based on ineffective assistance of counsel for not presenting an eyewitness identification expert.

II. *Failure to Request Alibi Instruction*

White contends his counsel's failure to request an alibi instruction (CALJIC No. 4.50) constituted ineffective assistance of counsel.³ The contention is without merit.

To obtain relief based on ineffective assistance of counsel, a defendant must show (1) that the challenged conduct was below the standard of care to be exercised by reasonably competent attorneys acting as diligent advocates; and (2) there is a reasonable probability a more favorable result would have been obtained absent counsel's failings. (*People v. Lewis* (1990) 50 Cal.3d 262, 288.) In determining competence, we assess counsel's overall performance throughout the case (*People v. Cox* (1991) 53 Cal.3d 618, 661), using deferential scrutiny (*People v. Ledesma* (1987) 43 Cal.3d 171, 216) and indulging a strong presumption that "counsel's performance falls within the 'wide range of professional assistance.'" (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 381 [quoting *Strickland v. Washington*, *supra*, 466 U.S. at p. 689].)

To prove prejudice, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694; see also *People v.*

³ CALJIC No. 4.50 reads: "The defendant in this case has introduced evidence for the purpose of showing that [he] [she] was not present at the time and place of the commission of the alleged crime for which [he] [she] is here on trial. If, after a consideration of all the evidence, you have a reasonable doubt that the defendant was present at the time the crime was committed, you must find [him] [her] not guilty."

An alibi instruction, such as CALJIC No. 4.50, is not required to be given sua sponte. (*People v. Freeman* (1978) 22 Cal.3d 434, 437-438.)

Ledesma, supra, 43 Cal.3d at pp. 217-218.) Absent a demonstration of prejudice, we need not consider whether counsel's performance was deficient to reject defendant's claim of ineffective assistance of counsel. (*Strickland v. Washington, supra*, 466 U.S. at p. 697; *In re Alvernaz* (1992) 2 Cal.4th 924, 945.)

White cannot prevail on his ineffective assistance of counsel argument because he has not demonstrated actual prejudice -- that is, there is a reasonable probability the verdict would have been different if an alibi instruction were given. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 958.)

Here, the jury was given general instructions on credibility (CALJIC Nos. 2.20, 2.21.1, 2.21.2, 2.22, 2.27), burden of proof (CALJIC No. 2.90), burden of proving identity based solely on eyewitnesses (CALJIC No. 2.91), and factors to consider in proving identity by eyewitness testimony (CALJIC No. 2.92). These instructions adequately informed the jury that it is "'to consider *all* the evidence in the case, and that [White] is entitled to an acquittal in case of a reasonable doubt whether his guilt is satisfactorily shown.' [Citations.]" (*People v. Freeman, supra*, 22 Cal.3d at p. 438; see also *People v. Alcala* (1992) 4 Cal.4th 742, 803-804.) CALJIC No. 4.50 (see fn. 3, *ante*) adds nothing substantive to these principles of law. (See *People v. Freeman, supra*, 22 Cal.3d at p. 438 [alibi instruction is redundant].) Since the evidence included Mrs. White's testimony that she and her husband were in the neighborhood looking for their dog, which had run away, the jury was sufficiently instructed that it could consider Mrs. White's testimony in determining whether the prosecution had met its burden of proof.

Accordingly, any failure by counsel to request CALJIC No. 4.50 was not prejudicial.

(*People v. Alcala*, *supra*, 4 Cal.4th at pp. 804-805.)⁴

III. CALJIC No. 17.41.1

White contends the trial court erred by instructing the jury with CALJIC No.

17.41.1, which reads:

"The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the court of the situation."

The contention is without merit.

White argues the instruction improperly chills jury deliberations, deprives him of the right to a unanimous verdict of 12 independent jurors, and deprives the jury of its power of nullification.

Recently, in *People v. Engelman* (July 18, 2002, S086462) __Cal.4th __ [2002 D.A.R. 8034, 8035, 8037], the California Supreme Court held CALJIC No. 17.41.1

⁴ Furthermore, we note that Mrs. White's testimony did not constitute a complete alibi. An alibi is a "defense based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time." (Black's Law Dict. (7th ed. 1999) p. 72; see also *People v. Gourdin* (1930) 108 Cal.App. 333, 335 [to warrant an alibi instruction, evidence must show defendant was somewhere other than the crime scene when crime was committed].) Mrs. White testified that sometime after 10:30 a.m. or 11:00 a.m., she and her husband searched their neighborhood, which was near Maya's 99 Cents Store, for their dog. She was not with him the entire time, and, at some point, she left him and returned to their apartment alone. Thus, Mrs. White's testimony was not inconsistent with White being the robber as he could have committed the robbery after his wife went back to their apartment.

passed constitutional muster. *Engelman* is controlling. Accordingly, we reject White's arguments.⁵

Moreover, there was no indication of juror misconduct in this trial. In fact, there is no indication that the use of CALJIC No. 17.41.1 affected the verdict in any way. Thus, there is no basis for reversal regardless of the constitutionality of the instruction.

DISPOSITION

The judgment is affirmed.

McCONNELL, J.

WE CONCUR:

NARES, Acting P. J.

O'ROURKE, J.

⁵ However, we note the Supreme Court, in the exercise of its supervisory power, barred the future use of CALJIC No. 17.41.1 because the instruction "creates a risk to the proper functioning of jury deliberations and . . . it is unnecessary and inadvisable to incur this risk." (*People v. Engelman, supra*, __Cal.4th at p. __ [2002 D.A.R. at 8037].)